Supreme Court, U. S.
FILED
JUN 2 1980
MICHAEL RODAK, JR., CLERK

In The

# Supreme Court of the United States

October Term, 1979

NO. 79-1779

STATE OF IOWA, STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

*Petitioners,*

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R. G. P. INCORPORATED, DARREL L., HAROLD M. AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON AND TRAVELERS INSURANCE COMPANY,

*Respondents (Petitioners on Separate Petitions),*

vs.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA,

*Respondents.*

## BRIEF FOR AMICI CURIAE IN SUPPORT OF THE STATE OF IOWA'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**States of Arkansas, Arizona, Connecticut, Florida, Hawaii, Indiana, Kansas, Louisiana, Michigan, Minnesota Missouri, Nevada, New Mexico, North Dakota, South Dakota, Utah, West Virginia Wisconsin, Wyoming**

JOHN STEVEN CLARK
Attorney General of the State of Arkansas
W. RUSSELL MEEKS III
Deputy Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

## TABLE OF CONTENTS

Pages

Authority to File Amici Curiae Brief ..... 1

Interest of Amici Curiae ..... 2

Questions Presented for Review ..... 4

Supplementary Statement of the Case ..... 5

Brief of the Amici Curiae ..... 7

Reasons for Granting the Writ:

I. The method used by the Court of Appeals to determine state property law violates the authority of state courts. ..... 7

II. The decision of the Court of Appeals unsettles the federal and common law definitions of accretion and avulsion. ..... 9

Conclusion ..... 11

## TABLE OF CITATIONS

CASES:

Benson v. Morrow, 61 Mo. 345 (1875) ..... 10

Bernhardt v. Polygraphic Company of America, 350 U. S. 198, 204-205 (1946) ..... 7

Bonelli Cattle Co. v. Arizona, 414 U. S. 313, 327, 38 L. Ed. 2d 526, 539-540, 94 S. Ct. 517 (1973) ..... 11

Conkey v. Knudsen, 143 Neb. 5, 8 N. W. 2d 538 (1943) (vacating 141 Neb. 517, 4 N. W. 2d 290 (1942)) ..... 6, 7, 8

TABLE OF CITATIONS—Continued

Pages

Coulthard v. Stevens, 84 Iowa 241, 50 N. W. 983, 984 (1892) ..... 10

Mullaney v. Wilbur, 421 U. S. 684, 691 (1975) ..... 7

McCormack v. Miller, 239 Mo. 463, 144 S. W. 101, 103 (1912) ..... 10

Nebraska v. Iowa, 143 U. S. 359 (1892) ..... 9, 10, 12

Oregon v. Corvallis Sand and Gravel Co., 429 U. S. 363 (1977) ..... 3, 9, 11

Peterson v. Morton, 465 F. Supp. 986, 995 (D. Nev. 1979) ..... 10

Philadelphia Company v. Stimson, 223 U. S. 605, 624 (1912) ..... 9

Porter v. Arkansas Western Gas Co., 252 Ark. 958, 961, 482 S. W. 2d 598 (1972) ..... 10

West v. American Tel. & Tel. Co., 311 U. S. 223, 226 (1940) ..... 7

Wilson v. Omaha Indian Tribe, 442 U. S. 653 (1979) ..... 2, 4

Wiltse v. Bolton, 132 Neb. 354, 272 N. W. 197 (1937) ..... 6, 8

Yutterman v. Grier, 112 Ark. 366, 166 S. W. 749, 751 (1914) ..... 10

TEXT:

Beck, The Wandering Missouri River: A Study in Accretion Law, 43 N. D. L. Rev. 429, 441-442, 466 (1967) ..... 10

## TABLE OF CITATIONS—Continued

Pages

RULE:

Rule 42 (4), United States Supreme Court Rules ..... 1

In The

# Supreme Court of the United States

October Term, 1979

NO. 79-1779

STATE OF IOWA, STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

*Petitioners,*

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R. G. P. INCORPORATED, DARREL L., HAROLD M. AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON AND TRAVELERS INSURANCE COMPANY,

*Respondents (Petitioners on Separate Petitions),*

vs.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA,

*Respondents.*

## BRIEF FOR AMICI CURIAE IN SUPPORT OF THE STATE OF IOWA'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**States of Arkansas, Arizona, Connecticut, Florida, Hawaii, Indiana, Kansas, Louisiana, Michigan, Minnesota Missouri, Nevada, New Mexico, North Dakota, South Dakota, Utah, West Virginia Wisconsin, Wyoming**

## AUTHORITY TO FILE AMICI CURIAE BRIEF

The States of Arkansas, Arizona, Connecticut, Florida, Hawaii, Indiana, Kansas, Louisiana, Michigan, Minnesota, Missouri, Nevada, New Mexico, North Dakota, South Dakota, Utah, West Virginia, Wisconsin, Wyoming, through their Attorneys General, respectfully submit this joint brief as amici curiae under the authority of Rule

42 (4), United States Supreme Court Rules. It is in support of the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit filed by the State of Iowa and the State Conservation Commission of the State of Iowa.

———o———

## INTEREST OF AMICI CURIAE

The State of Arkansas and the other States joining as *amici curiae* have significant interest in the method of analysis used by federal courts to determine state common law, and especially state property law. This interest of the States in the application of state law was previously recognized by this Court in its prior decision that Nebraska property law should be borrowed as the rule of decision in this case. *Wilson v. Omaha Indian Tribe* (App. 19-24, 28). The perceived failure of the Court of Appeals to follow Nebraska Supreme Court decisions in determining Nebraska property law weakens the authority of state courts as the ultimate arbiters of state law. The States also have significant interest in preserving the traditional and workable criteria for determining the effect of river movement on previously existing boundaries. The decision of the Court of Appeals casts significant doubt on the common law definitions of accretion and avulsion, especially as applied in federal courts. Its conclusion that the sudden shift of channel within a river bed is avulsion creates great difficulties of proof and will encourage claims of avulsion as to lands presently occupied and used by riparian landowners. The States' ownership of river beds

or abandoned river beds under the equal footing doctrine, *see Oregon v. Corvallis Sand and Gravel Co.*, 429 U. S. 363 (1977), and the States' interests as representative of their citizens are adversely affected by this decision as it unsettles the law of riparian ownership. The view of federal law expounded by the Court of Appeals may also affect interstate boundary disputes as well as create uncertainties as to choice of law in private riparian property suits.

The States of Arkansas, Minnesota, Missouri, North Dakota, and South Dakota, located as they are in the Eighth Circuit, are especially affected by the definitions of accretion and avulsion adopted by the Court of Appeals. The preference for avulsion stated by the Court, the deletion of objective criteria for avulsion, and the avoidance of contrary state decisions exhibited in this decision will encourage Indian Tribes and others claiming avulsion and having a basis for federal jurisdiction to resolve such claims in federal court. Considering the fact that both the Mississippi and the Missouri Rivers are in large part located in the Eighth Circuit, the immediate consequence of the Court of Appeals' view of this body of law may be great.

The states of the Eighth Circuit are significantly affected by the methodology used by the Court of Appeals to determine state law. The failure to hew closely to state court decisions not only undermines existing decisions of those state courts but also encourages suit in federal court by those dissatisfied with state law. Such forum-shopping in suits to be governed by state law further undermines the authority of state courts and results

in unfair advantage to the plaintiff who has a ground for federal jurisdiction.

———o———

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Court of Appeals is inconsistent with the mandate of this Court in *Wilson v. Omaha Indian Tribe,* 442 U. S. 653 (1979), that the governing rule of decision in this case is Nebraska law.

2. Whether the Court of Appeals erred in determining that Nebraska's common law rules of property differ from those pronounced by the Nebraska Supreme Court.

This question includes the following specific questions:

(a) Whether a federal court may, when determining state property law, reject state court precedent defining accretion and avulsion not because of subsequent events providing persuasive evidence that the state court would modify its decision but because all parties there seeking to quiet title claimed ownership by accretion.

(b) Whether a federal court may predict a change in state law without stating reasons for finding subsequent clear and persuasive indication that earlier pronouncements would be modified by the state's highest court.

(c) Whether a federal court may exercise its independent judgment on a question of state property law without first finding that there are no relevant state policies or state methodologies to guide the court in predicting the result in the state's highest court.

(d) Whether a federal court may predict that a state court would significantly alter vested property rights and require additional elements of proof to establish such property rights.

(e) Whether a federal court may predict that a state court will rely on certain federal decisions to develop common law principles contrary to decisions of the United States Supreme Court.

3. Whether the Court of Appeals relied on an erroneous view of the federal law of accretion and avulsion as the basis for determining Nebraska law.

4. Whether the Court of Appeals erred in giving Petitioners inadequate opportunity to present their views on remand from this Court.

## SUPPLEMENTARY STATEMENT OF THE CASE

The States appearing as *amici curiae* adopt the statement of the case as set forth in the State of Iowa's petition. *Amici* provide the following summary of that portion of the decision of the Court of Appeals which is material to consideration of the questions presented.

The Court of Appeals, on remand to determine whether the District Court properly determined Nebraska law, determined that Nebraska defined accretion and avulsion according to "basic common law principles". The Court of Appeals rejected identifiable land in place as a necessary element of avulsion, holding instead that the common law definition of avulsion includes "a sudden and rapid change of the channel, within or without the bed of a stream, whether or not intervening land is submerged

during a sudden flood." (App. 41). The Court of Appeals found that the presence of identifiable land in place was relevant only to disprove erosion, an element of accretion (App. 43). For a movement of the Missouri River to be accretive, the Court of Appeals held the river must change by a process of erosion which "completely disintegrates" the land between the old and new channels and the deposit of soil must be gradual (App. 39). Since the land claimed in this case was sand and sediment and would lack identifying features, the Court of Appeals determined that the individual landowners had failed to prove that erosion destroyed the land in question (App. 45).

In reaching its conclusion as to the common law of Nebraska, the Court of Appeals recognized that *Conkey v. Knudsen,* 143 Neb. 5, 8 N. W. 2d 538 (1943) (vacating 141 Neb. 517, 4 N. W. 2d 290 (1942)), held to the contrary that a river movement during a single high water period caused by an ice jam was accretive. Nonetheless, the Court of Appeals explained away that case by the fact that all parties there claimed by accretion (App. 42, n. 7). The Court of Appeals did not consider *Wiltse v. Bolton,* 132 Neb. 354, 272 N. W. 197 (1937), cited by the District Court (App. C 13) and relied upon by the Petitioners, which held that the shifting of the channel from one side of the bed to the other during a single high-water period was not an avulsion. Although the Court of Appeals recognized that many Nebraska cases cite identifiable land in place as an element of avulsion, it determined that the existence of identifiable land was not an element of avulsion in Nebraska (App. 42-43, n. 8; App. A 31, n. 30).

———o———

## BRIEF OF THE AMICI CURIAE

---

## REASONS FOR GRANTING THE WRIT

### I. The method used by the Court of Appeals to determine state law violates the authority of state courts.

The Court of Appeals exceeded the authority of a federal court to find state law when it rejected a contrary Nebraska decision and ignored other decisions relied upon by the District Court and the parties. While federal courts are often necessarily required to predict whether early state court decisions may no longer be followed because of later indications that the law is in a state of flux, this power to predict state law is limited to those situations in which state law itself provides "clear and persuasive indication" of change. *West v. American Tel. & Tel. Co.*, 311 U. S. 223, 226 (1940); *Bernhardt v. Polygraphic Company of America*, 350 U. S. 198, 204-205 (1946). The reason federal courts may then refuse to apply older precedents is that otherwise the outcome would likely differ from that obtainable in state court; the same principle otherwise requires close adherence to state decisions.

The Court of Appeals did not find clear and persuasive indication in later Nebraska authorities that the decision in *Conkey v. Knudsen*, 143 Neb. 5, 8 N. W. 2d 538 (1943), vacating 141 Neb. 517, 4 N. W. 2d 290 (1942), would be overruled today but instead it chose to explain away the Nebraska Supreme Court decision. Even in a case where it was claimed that the state court's reasoning was a subterfuge to avoid federal law, this Court has refused to look behind the decision of a state court on ques-

tions of state law. *Mullaney v. Wilbur,* 421 U. S. 684, 691 (1975).

The failure of the Court of Appeals to examine all Nebraska authorities cited to it, to make findings whether these cases provide governing state policies and precedent, and to make findings whether subsequent Nebraska authorities provide clear and persuasive indication that *Conkey II* or *Wiltse* would be overruled is itself error. In this case the error clearly is prejudicial both to the parties and to the authority of state courts. This failure to utilize proper methodology for determining state law and the resultant application of the Court's views of the basic common law caused the Court of Appeals to adopt rules of property never before adopted by the Nebraska Supreme Court.

Given the strong interest in stability of land titles and the long history of real property concepts, federal courts must be extremely limited in developing new definitions of property under state law. The Nebraska Supreme Court has defined accretion and avulsion many times without ever adopting the definitions stated to be its law by the Court of Appeals. Twice it has ruled directly contrary to the view expressed by the Court of Appeals. It has emphasized a factor for avulsion, identifiable land in place, which was not applied by the Court of Appeals (App. 42-43). But even if there were uncertainty in Nebraska law, the Court of Appeals erred in not looking to Nebraska's policies in predicting how the Nebraska Supreme Court would resolve the uncertainty. Furthermore, it is contended that the Court of Appeals may not adopt as a matter of state law a new property concept which is supported by neither the strong weight of common law au-

thority nor, where based in part on federal law, the decisions of this Court.

As this Court has frequently noted, "Substantive rules governing the law of real property are particularly subject to the principle of stare decisis. See *United States v. Title Ins. Co.*, 265 U. S. 472, 68 L. Ed. 1110, 44 S. Ct. 621 (1924)." *Oregon v. Corvallis Sand and Gravel Company*, 429 U. S. 363, 381, 50 L. Ed. 2d 550, 565, 97 S. Ct. 582 (1977). Since this case involves no evolving body of law or other factors complicating the determination of state law, it is an appropriate vehicle for this Court to provide guidance to the federal courts on the methodology to be used in determining state property law.

**II. The decision of the Court of Appeals unsettles the federal and common law of accretion and avulsion.**

The Court of Appeals, as a matter of "basic common law principle", defined avulsion as follows: "avulsion occurs when there is a sudden and rapid change of the channel, within or without the bed of a stream, whether or not intervening land is submerged during a sudden flood." (App. 41).

The preference for avulsion shown by the decision is contrary to the general concept that accretion is the rule and avulsion an uncommon exception. *Nebraska v. Iowa*, 143 U. S. 359 (1892), quoting Vattel. The conclusion that avulsion can occur within the river bed has been rejected by this Court in *Louisiana v. Mississippi*, 384 U. S. 24 (1966), affirming the Report of the Special Master, p. 20. The sudden shift of a channel around sandbars in a river bed lacks the necessary element that avulsion be not only sudden but also perceptible when it takes place. *Philadelphia Company v. Stimson*, 223 U. S. 605, 624 (1912). The

decision leaves open the question whether a rapid change of the channel must be significant to constitute an avulsion. Cf. *Peterson v. Morton,* 465 F. Supp. 986, 995 (D. Nev. 1979) (rapid movements of channel within river would not be regarded as significant avulsions).

Several states in the Eighth Circuit will specifically be adversely affected by the failure of the Court of Appeals to analyze all Nebraska authorities. These states' property laws rely on a predictable definition of accretion and avulsion. In determining identifiable land in place to be an essential element for avulsion, the following cases have relied on *Nebraska v. Iowa,* 143 U. S. 359 (1892), or *Benson v. Morrow,* 61 Mo. 345 (1875): *Yutterman v. Grier,* 112 Ark. 366, 166 S. W. 749, 751 (1914); *Porter v. Arkansas Western Gas Co.,* 252 Ark. 958, 961, 482 S. W. 2d 598 (1972); *McCormack v. Miller,* 239 Mo. 463, 144 S. W. 101, 103 (1912); *Coulthard v. Stevens,* 84 Iowa 241, 50 N. W. 983, 984 (1892). Additionally, as noted in Beck, *The Wandering Missouri River: A Study in Accretion Law,* 43 N. D. L. Rev. 429, 441-442, 466 (1967), almost all of the jurisdictions located along the Missouri River have rejected rapidity of change as the primary element for distinguishing between accretion and avulsion.

The rational for avulsion does not apply where the channel shift occurs within the bed of a river bed nor where no identifiable land is left in place.

> The rationale for the doctrine of avulsion is a need to mitigate the hardship that a shift in title caused by a sudden movement of the river would cause the abutting landowners were the accretion principle to be applied.

*Bonelli Cattle Co. v. Arizona,* 414 U. S. 313, 327, 38 L. Ed. 2d 526, 539-540, 94 S. Ct. 517 (1973), overruled on other grounds, *Oregon v. Corvallis Sand and Gravel Company,* 429 U. S. 363, 50 L. Ed. 2d 550, 97 S. Ct. 582 (1977). The only hardship caused one losing land below the ordinary high water mark is loss of ownership of an area "under the sky". While such land is within the bed, it has little utility. If not identifiable after the shift, there is no perceptible hardship to the extent required to establish avulsion.

Since the American law has always favored accretion, loss of ownership of an area "under the sky" is insufficient alone to overcome the strong policies favoring accretion. Among these are the value of riparianness, the expectancy of riparian owners to a continuing river boundary, the vested right to future alluvion, and the compensation for other lands lost to the river. *Bonelli, supra,* 414 U. S. at 326, 38 L. Ed. 2d at 539. Allowing avulsion to be found when a channel shifts suddenly within the bed of a river will defeat the doctrine that riparian ownership follows the movement of the river.

## CONCLUSION

The petition for certiorari of the State of Iowa raises issues of great significance to the federal judiciary, to the States, and to private riparian landowners throughout the nation. If the discretion of federal courts to determine state common law affecting property ownership is not carefully exercised, the ability of the states to protect reason-

able expectations of property ownership is seriously undermined. The erroneous definitions of accretion and avulsion cited as basic common law principles by the Court of Appeals unsettle federal law and the law of those states which have followed *Nebraska v. Iowa,* 143 U. S. 359 (1892).

The *amici* states respectfully request that the Court grant the petition for certiorari of the State of Iowa and resolve the questions presented so as to preserve the authority of state courts in our system of dual sovereignty.

Respectfully submitted,

JOHN STEVEN CLARY
Attorney General of the State of Arkansas

W. RUSSELL MEEKS, III
Deputy Attorney General

*Attorneys for Amicus Curiae State of Arkansas*

see 7 9

1741

see 79

1744